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No. 98-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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In The

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October Term, 1998

No. 98-183

LANDGATE, INC.

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation have received the parties' written consent to file this brief as *amicus curiae* in support of the petitioner and have filed the letters of consent with the Clerk of the Court.[1]

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[1] No counsel for either party authored any part of this brief. No person or entity other than the NAHB and the BILD Foundation made any monetary contribution to the preparation of submission of this brief.

THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO OBTAIN JUST COMPENSATION WHEN GOVERNMENTAL ACTION HAS DEPRIVED THEM OF ALL VIABLE USE OF THEIR LAND FOR SOME PERIOD OF TIME

The NAHB represents over 195,000 builder and associate members throughout the United States, over 5300 of whom are in California. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the remedy available to its members when, as in the case at bar, governmental action has deprived them of all viable economic use of their land for some period of time.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)[2], and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

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[2] The Court's opinion cited the NAHB's brief.

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent part of the NAHB, whose 1,600 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

The NAHB and the BILD Foundation submit their *amici curiae* brief in support of the petitioner in the present case to convince the Court to grant its writ of certiorari because, at bottom, the question is whether the courts of California are required to follow the law laid down by this Court or whether they are free to go their own way and hold that the commands of the Fifth and Fourteenth Amendments of the federal Constitution do not apply in California.

SUMMARY OF THE ARGUMENT

This Court has spoken on a number of issues concerning regulatory takings. The courts of California have seen fit to disregard many of this Court's pronouncements.

This Court has held that a claim that regulation has taken land is ripe when the governmental entity imposing the regulation has reached a final decision concerning the application of the regulation; the courts of California have held that there is no final decision until a court has determined the validity of the regulation.

This Court has held that a per se taking has occurred when regulation deprives the owner of land all viable economic use of that land; the courts of California have held that the legitimacy of the reason for the regulation must be considered.

This Court has held that the ability to use land is a right; the courts of California have held that it is a privilege.

This Court has held that the ownership and use of land is a right protected by the substantive component of the Due Process Clause; the courts of California have held that there is no protected right where a discretionary approval is involved.

This Court has held that a taking of land occurs when governmental action does not substantially advance a legitimate state interest or when it deprives a landowner of viable economic use of his or her land; the courts of California cannot agree on what that means.

California has walled itself off from the dictates of t his Court and the rest of the nation when it comes to land use. Unless this Court grants its writ of certiorari and reverses the California Supreme Court's decision in *Landgate, Inc. v. California Coastal Commission*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188 (1998), landowners in California will continue to be deprived of rights recognized by this Court and enjoyed by landowners in every other state.

ARGUMENT

I. THE REGULATORY PROCESS DOES NOT INCLUDE JUDICIAL REVIEW

A. *The United States Supreme Court*

> "As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the governmental entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue.
>
> * * *
>
> "...While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, respondent would not be required to resort to those procedures before bringing its §1983 action because those procedures clearly are remedial." *Williamson County, supra,* 473 U.S. at 186 and 193 [citations omitted].

B. *The Courts Of California*

The California Supreme Court did not see fit to refer to *Williamson County* on the question of whether judicial review was part of the regulatory process in its opinion in *Landgate.* Instead, it sidestepped the issue entirely.

> "Nothing in *First English [Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)], however, is inconsistent with the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a landowner must resort to such a determination does not constitute a per se temporary taking." *Landgate, supra,* 17 Cal.4th at 1030, 73 Cal.Rptr.2d at 841, 953 P.2d at 1203 [italics in the original].

II. THE PRESENCE OF A LEGITIMATE GOVERNMENTAL PURPOSE DOES NOT PROTECT A GOVERNMENTAL ENTITY FROM LIABILITY WHEN REGULATION DEPRIVES LAND OF ALL VIABLE ECONOMIC USE FOR SOME PERIOD OF TIME

A. *The United States Supreme Court*

This Court has held that there are situations where governmental action can result in a taking without the application of any balancing test. After discussing the general need for "essentially ad hoc, factual inquiries" to determine when a taking has occurred, this Court stated:

> "We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. ...
>
> "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)(landowner did not take issue with the validity of South Carolina's Beachfront Management Act).

This recognition that the achievement of legitimate governmental interests may require going beyond the use of the police power alone is, of course, no more than a restatement of the general rule that the measure of just compensation is not what the government has gained but rather what the landowner has lost. *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1909).

B. *The Courts Of California*

The California Supreme Court completely rejected this Court's holding in *Lucas* and held that the courts of California are to consider the validity of interests to be served:

> "[G]overnment land use regulations and decisions ... which, despite their ultimately determined statutory defects,

are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property under the Supreme Court's doctrine ..." *Landgate, supra,* 17 Cal.4th at 1021, 73 Cal.Rptr.2d at 850, 953 P.2d at 1197.

III. THE DEVELOPMENT OF LAND IS A RIGHT, SUBJECT TO REASONABLE REGULATION, AND NOT A PRIVILEGE

A. *The United States Supreme Court*

"But the right to build on one's own property - even though its exercise can be subjected to legitimate permitting requirements - cannot remotely be described as a governmental benefit. " *Nollan, supra,* 483 U.S. at 833, n.2.

B. *The Courts Of California*

"The dedication of land or the payment of fees is a condition precedent to development is voluntary in nature. Even though the developer cannot legally develop without satisfying the condition precedent, he voluntarily decides whether to develop or not to develop. **Development is a privilege not a right.**" *Trent Meredith, Inc. v. City of Oxnard,* 114 Cal.App.3d 317, 328, 170 Cal.Rptr. 685, 691 (1981)[emphasis added].

Of course, *Trent Meredith* was decided before this Court's decision in *Nollan*; unfortunately, that is irrelevant as far as the courts of California are concerned. See, *e.g.*, *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 893, 50 Cal.Rptr.2d 242, 268, 911 P.2d 429, 455, *cert. denied*, - U.S. -, 117 S.Ct. 299 (1996), and *Centex Real Estate Corp. v. City of Vallejo*, 19 Cal.App.4th 1358, 1363, 24 Cal.Rptr.2d 48, 51, (1993), both of which spoke of "the privilege of developing property."

IV. THE USE AND ENJOYMENT OF LAND IS A PROPERTY RIGHT PROTECTED BY THE CONSTITUTION

A. *The United States Supreme Court*

This Court has held that land is property within the meaning of the Fifth and Fourteenth Amendments and that the owner of land is entitled to their protection.

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)[citation omitted].

Nor is this a new idea.

> "The right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

B. *The Courts Of California*

The courts of California disagree; they hold that there can be no property interest protected by the Due Process Clause where there is discretion.

> "Any significant discretion conferred upon the local agency defeats the claim of a property interest." *Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152, 1180, 56 Cal.Rptr.2d 223, 240 (1996), *cert. denied*, - U.S. -, 117 S.Ct. 1430 (1997) (neither procedural nor substantive due process protection is available where a local agency wrongfully denied a discretionary land use approval).

V. A TAKING OCCURS WHEN GOVERNMENTAL ACTION FAILS TO ADVANCE A LEGITIMATE STATE INTEREST

A. *The United States Supreme Court*

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court set the standard for determining when land use regulation took land:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." [Citations omitted.]

The formulation in *Agins* does not stand alone; it has been repeatedly cited by the Court. See, *e.g.*, *Dolan, supra*, 512 U.S. at 386, *Lucas, supra*, 505 U.S. at 1016, *Nollan, supra*, 483 U.S. at 834, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987), *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985), and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981).

Further, this Court has made it clear that a violation of the first prong of the *Agins* test, standing by itself, can result in a taking of the land affected even though the regulation leaves value in the land. *Dolan, supra*, 512 U.S. at 385 n.6 ("Petitioner assuredly is able to derive *some* economic use from her property.")[emphasis in the original].

B. *The Courts Of California*

> "There are several problems with [the landowner's] attempt to show that, as a matter of law, a taking of property occurred here. First, we cannot accept [the landowner's] theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law. In *Nollan, Lucas,* and *Dolan*, the United States Supreme Court's analysis of the taking issue inextricably linked both the regulation's validity and the question of whether an economically beneficial use of the property remained in light of the regulation. In light of later authority, *Agins* did not establish an 'either/or' type of test." *Del Oro*

Hills v. City of Oceanside, 31 Cal.App.4th 1060, 1079, 37 Cal.Rptr.2d 677, 690 (1995).[3]

VI. JUST COMPENSATION MUST BE PAID WHEN A REGULATION TAKES LAND FOR THE TIME THAT THE REGULATION REMAINS IN EFFECT

A. *The United States Supreme Court*

> "We merely hold that where the government's actions have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

This Court recognized that the result would be to limit the flexibility of local governments and to impose costs on local government which, in California, they had not had to bear before.

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of

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[3] In fairness to the courts of California, it should be noted that another court of appeal, in 152 *Valparaiso Associates v. City of Cotati*, 56 Cal. App. 4th 378, 385-386, 65 Cal.Rptr.2d 551, 555-556 (1997), disagreed with the statement in *Del Oro Hills*.

> municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English, supra,* at 321.

B. *The Courts Of California*

The *Landgate* case before this Court is only the latest statement of the California Supreme Court that it does not intend to be bound by this Court's decision in *First English.* For example, in *Kavanau v. Santa Monica Rent Control Board,* 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (1997), the California Supreme Court dealt with a case where the court of appeal had earlier held that the landlord's constitutional right had been violated, a holding that the California Supreme Court felt itself bound by. *Kavanau, supra,* 16 Cal.4th at 777-779, 66 Cal.Rptr.2d at 682, 941 P.2d at 861. The California Supreme Court held that the landlord was not entitled to damages; the only remedy that he was entitled to was the opportunity to charge higher rents in the future even though he would have to charge higher than market rents to make up for what he had lost. *Kavanau, supra,* 16 Cal.4th at 785, 66 Cal.Rptr.2d at 687, 941 P.2d at 866.

Quite simply the California Supreme Court's decisions are guided by a world view substantially different from that expressed by this Court in *First English.*

> "The disparity in resources between the federal government and local governmental entities both explains and justifies the state procedure. The likelihood that the impact of a federal regulatory statute may affect a taking of property of such value is to threaten the federal treasury with insolvency is remote. Congress has determined that providing a damage remedy for those cases in which a taking occurs will not cause undue hardship. Few local governments could afford the financial impact of a decision that a widely applicable zoning or regulatory ordinance brought about a taking of all affected property." *Hensler v. City of Glendale*, 8 Cal.4th 1, 18-19, 32 Cal.Rptr.2d 244, 255, 876 P.2d 1043, 1054 (1994) [footnote omitted].

This is, of course, a reprise of what the California Supreme Court said almost 20 years ago in *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). In *Agins*, the California Supreme Court, after quoting from a number of law review articles listing a parade of horribles which would result if a court were ever to hold that a land use regulation which went too far could result in inverse condemnation and the payment of just compensation, concluded:

> "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which adheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." *Agins, supra*, 24 Cal.3d at 276-277, 157 Cal.Rptr. at 378, 598 P.2d at 31.

CONCLUSION

The NAHB and the BILD Foundation do not stand alone in believing that the courts of California have missed the mark. Some of the most respected observers of the land use scene have frequently noted the same thing.

> "The striking feature of California zoning law is that the courts of that state have quite consistently been far rougher on the property rights of developers than those in any other state. In a fairly long series of cases, the California court has upheld restrictions on property right which would not be upheld in many other states, and (in some circumstances) probably not in any other." 1 Williams, *American Planning Law*, § 6.03, *Differences Between The States - California*, at 184 (1988 rev.).

> "In California the property owner has virtually no fundamental rights to use land under the state constitution, at least as interpreted by the state supreme court. The court in the 1980s supported the view that the use of one's land is a privilege, not a right, and that private use may be conditioned on favors toward the state. The California court is the home of hierarchy in which rights are tied to roles and experts or those claiming to speak for the groups prescribe the autonomy of individuals. The attachment of public service conditions to land is evocative of the feudal emphasis on status and obligation, and the heavily decentralized regulatory process can make California communities akin to feudal fiefdoms. In the state of California, the supreme court implied that the king could do no wrong, although in a democracy the king is more likely to be a planning and zoning commission than a monarch in robes." Coyle, *Property Rights and the Constitution*, Ch. 5, *California: Where Deference Reigns Supreme*, 118 (1993)[footnote omitted].

Two of America's best known land use lawyers, Richard Babcock and Charles Siemon, discussed the treatment of a landowner by the California Coastal Commission - the present respondent - in their book, *The Zoning Game Revisited* (1985).

"And then there were many procedural practices of the Commission that outraged many lawyers, as they should have: no cross-examination; a limited time to speak (ten minutes); and commissioners leaving the room or turning their backs when the lotowners' lawyers spoke. But anyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests when they challenge governmental practices. The Fourteenth Amendment appears to be nonexistent.

* * *

"Finally, there are the unfortunate persons caught in the squeeze for almost ten years, watching interest rates and inflation soar and denied the right to build. It is reminiscent of San Antonio and the absolute moratorium. But there's a difference: that was Texas, and this story took place in California. In the former jurisdiction, the courts would have thrown it out with no second thought. In California, the courts have elevated governmental arrogance to a fine art.

* * *

> ". . . What *can* one say about the California courts other than that one has to be a madman to challenge a governmental regulation in that bizarre jurisdiction?" *Babcock & Siemon, supra,* at 251, 253 and 257 [citation omitted; italics in the original.]

Babcock & Siemon summed up the relationship between developers who own land in California and the protection of their rights to use their land in one sentence:

> "Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat." *Babcock & Siemon, supra,* at 293.

The treatment that Landgate received at the hands of the California Supreme Court is, unfortunately, not untypical and it is likely to continue unless, and until, this Court makes it clear that it meant what it had said in previous cases:

- The ownership of land means that the landowner has a property right, protected by the Fifth and Fourteenth Amendments to the federal Constitution, to use that land subject, of course, to reasonable regulation.

- When a landowner is deprived of all viable economic use of his or her land for some period of time, the federal Constitution mandates the payment of just compensation for that period.

- The question is not whether the local government meant to sterilize the land for some period of time but whether it actually did so; there is no good-hearted, empty-headed defense (local government's plea that it didn't mean to do it; that it was all a mistake).

- The Fifth and Fourteenth Amendments to the federal Constitution protect landowners even when their land is located in California.

The NAHB and the BILD Foundation respectfully request that this Court grant Landgate's petition for writ of certiorari.

Respectfully submitted,

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